HOCK SENG CONSTRUCTION SDN BHD & ANOR

v.

YONG KON FATT & ANOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL HAMID MOHAMAD JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: A-02-525-2000]
15 JUNE 2001

CIVIL PROCEDURE: *Appeal - Record of appeal - Supplementary record of appeal - Application for extension of time to file - No explanation why sealed order was not filed with original record of appeal - Whether delay without explanation fatal - Whether appeal properly before court*

This was an application by the appellants for an extension of time to file a supplementary record of appeal to include the sealed order of the High Court appealed from. This application by notice of motion was filed, apparently, to comply with the requirements set out in the recent decision of the Court of Appeal in *Capital Insurance Bhd v. Kassim Mohd Ali*.

Held:
Per Shaik Daud Ismail JCA

[1] The affidavit in support of the appellants' motion did not explain at all why the sealed order was not filed together with the original record of appeal. A mistake on the part of the appellants' solicitors was not an explanation. The delay *per se* in filing the sealed order was not fatal but such a delay without an explanation was.

[Motion dismissed; appeal struck out.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah permohonan perayu untuk memanjangkan masa memfailkan rekod tambahan perayu bagi mengambil kira perintah Mahkamah Tinggi yang sudah disahkan. Permohonan ini adalah difailkan untuk mematuhi kehendak-kehendak keputusan Mahkamah Rayuan dalam kes *Capital Insurance Bhd v. Kassim Mohd Ali*.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Affidavit yang menyokong permohonan perayu langsung tidak menjelaskan mengapa perintah Mahkamah Tinggi yang sudah disahkan tidak difailkan bersama dengan rekod rayuan yang asli. Kesilapan daripada pihak peguamcara bukanlah satu alasan. Kelewatan *per se* dalam memasukkan perintah tersebut tidak memudaratkan tetapi kelewatan tanpa penjelasan yang munasabah adalah memudaratkan.

[Permohonan ditolak; rayuan dibatalkan.]

Case(s) refered to:
Capital Insurance Bhd v. Kassim Mohd Ali [2000] 1 CLJ 269 ***(foll)***
Ratnam v. Cumarasamy & Anor [1995] 1 MLJ 228 ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 18

For the appellants - Leong Choo Kong (Leong Sai Hwa & Thomas Su with him); M/s CK Leong & Co
For the respondents - Ng Hock Cheh (Kelvin Ding with him); M/s Nga Hock Cheh & Co

[Appeal from High Court, Ipoh; Civil Suit No: 22-151-94]

Reported by Gan Peng Chiang

JUDGMENT

Shaik Daud Ismail JCA:

This was an appeal from the decision of the Ipoh High Court which had given judgment for the respondent for vacant possession of property known as H.S.(D) Dqs. 3754 Mukim of Sitiawan, liquidated damages for late delivery in the sum of RM68,331.94 and consequential prayers.

The respondents had filed a writ of summons against the appellants based on a sale and purchase agreement of the above mentioned property executed on 15 August 1992.

At the hearing of this appeal the appellants had also filed a notice of motion seeking an extension of time to file a supplementary record of appeal to include a sealed copy of the order of the High Court, pursuant to the decision of this court in *Capital Insurance Bhd v. Kassim Mohd Ali* [2001] 1 CLJ 269. Before this decision a photocopy of the order could be filed. In fact a photocopy of the order was filed on 15 September 2000 long after the above

decision was decided on 6 December 1999. It is the submission of learned counsel for the applicant/appellant that on realising their mistake, they now file this notice of motion.

The affidavit in support of the motion gave no explanation whatsoever as to why the sealed copy of the order was not filed together with the original record of appeal. The photocopy of the order was filed long after the decision in *Capital Insurance*'s case was decided. Some relevant material ought to be put before this court to enable us to exercise our discretion to extend time for filing the supplementary record of appeal. The sealed copy of the order was available since the judgment on 14 December 1999, and yet it was not filed and no explanation was put forward for this failure. In fact until the date of this notice of motion the sealed order was not filed. Learned counsel for the respondents also pointed out that the chronology of events under r. 18 Rules of the Court of Appeal 1994 was served out of time ie, six months out of time. The mistake of solicitors in not filing the sealed copy of the order on time, cannot constitute an explanation. It is trite that the courts have a discretion to extend time to file documents. It is our view that a delay in filing *per se* is not fatal but a delay with complete lack of explanation as to why there was a delay is fatal. It has often been reminded that "rules of court must *prima facie* be obeyed" and in order to justify a court in extending the time there must be some material upon which the court could exercise its discretion. (See *Ratnam v. Cumarasamy & Anor* [1995] 1 MLJ 228 PC).

For the above reason we dismissed the motion with costs. In the light of this there is no appeal proper before this court and the appeal is hereby struck out with costs and we order the deposit to go to account of costs. Consequently we discharge a stay order issued on 2 August 2000.